the death of the deceased was the direct result of the negligent act of the appellant had been proved to the hilt (see *Kurban Hussein* v. *State of Mahrashtra* (4)). The cause of death which reads, "Small abrasions over front of right chest about the middle" is not consistent with probability that the deceased met his death as the direct result of a road accident. Where there is a doubt in the prosecution case, it must be resolved in favour of the appellant. On this ground the conviction under section 304A Penal Code cannot stand.

It is my opinion that the facts as found by the learned president warranted a finding of inconsiderate driving. I will therefore set aside the conviction and sentence imposed by the learned president under section 304A Penal Code and substitute a conviction and a fine of $200 under section 36(1) of the Road Traffic Ordinance. The order of disqualification is also set aside and in its place I order endorsement of his driving licence. Any excess of payment of fine will be refunded to the appellant.

Appeal allowed.

Solicitors: *Joseph & Son.*

LIM KER v. CHEW SEOK TEE

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) June 26, 1967]

[Penang — Federal Court Civil Appeal No. X. 99 of 1966]

Practice and Procedure — Execution — Illegal execution — Sale of temporary type of building — Is this chattel house or personal chattel — Entering into possession is equivalent to delivery of possession of chattel.

Practice and Procedure — Costs — When successful party entitled to costs as of right.

Practice and Procedure — Judge procuring further evidence — No right to call on his own initiative and without consent of parties — Practice undesirable.

This was an appeal against the decision of Yong J. ([1967] 1 M.L.J. 236) reversing the judgment of the President of the Sessions Court at Sungei Patani and declaring that the respondent was the owner of a house at Lunas, which consequently was not liable to attachment upon a decree obtained by the appellant in the Sessions Court against one *T*. *T* was the *quondam* owner of the house which was built on land belonging to another. On June 25 1962 he sold it to the respondent and gave her a note or memorandum of the sale, which was stamped for *ad valorem* duty at the Stamp Office the same day the respondent went into possession of the house. On June 26, the respondent delivered to the Lunas Local Council both the sale note and a letter signed by the vendor requesting registration of the house in the name of the new owner for payment of local rates. Council approval of the change was given on June 27, 1962 and endorsed on the application.

On July 7, 1962, *T* drew two cheques and delivered them to the appellant. On July 30, *T* was sued thereon and a decree obtained against him in due course. On June 21, 1964 the appellant's solicitors sought information from the clerk in the local council regarding the ownership of the house in question with a view to levying execution. They were informed that the owner was *T*, and the house was thereupon attached on June 25, 1964. As a result of the solicitors' inquiry the local council clerk found that he had forgotten to record the change of ownership, which he should have done on June 26, 1962. He informed the appellant's solicitors to that effect on June 30, 1964 and rectified the error in the register by an entry on that date. The execution, however, was not withdrawn and on July 3, 1964 the respondent was compelled to lodge her objection, claiming ownership of the property.

Held: (1) a judgment creditor can levy execution only on property belonging to the debtor or appearing to belong to him by reason of being in his apparent possession, not on property belonging to any third party at the creditor's mere whim and fancy;

(2) the learned judge in this case was right in allowing the appeal of the objector (respondent in this appeal) and this appeal was therefore dismissed.

After the objector had closed her case and no evidence was adduced by the plaintiff, the learned president of the sessions court himself called one witness and examined him at length.

Held: it is so well established in our law that the judge is not allowed in a civil action to call a witness whom he thinks might throw some light on the facts without the consent of the parties.

Per Ong Hock Thye F.J.: Where a party successfully enforces a legal right and in no way misconducts himself he is entitled to costs as of right.

Cases referred to:—

(1) *In re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 K.B. 327.

(2) *Jones* v. *National Coal Board* [1957] 2 Q.B. 55, 64.

(3) *Jones* v. *Curling* (1884), 13 Q.B.D. 262, 265.

(4) *Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732, 811-812.

FEDERAL COURT.

Lim Kean Siew for the appellant.

C. O. Lim (*Oo Gin Sun* with him) for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: The plaintiff obtained judgment against the defendant in Sungei Patani Sessions Court Civil Action No. 22 of 1963 and in execution of the decree attached house No. 7-B, Kampong Bharu, Lunas. Chew Seok Tee, a Chinese lady (hereinafter called the objector) objected to the attachment on the ground that she was the owner of the said house. She gave evidence before the Sessions Court that on 25th June, 1962, she purchased the house from the defendant who gave her a document of sale (Exhibit P.1). The learned president dismissed her objection. She then appealed to the High Court which allowed her appeal. The plaintiff now appeals to this court.

The appeal was heard in Penang and we dismissed it, intimating that we would give written judgment later and we now do so.

The main ground of appeal is whether the building is a "personal chattel" as defined under section 3 of the Bills of Sale Ordinance, 1950. The learned judge held that it was not a "personal chattel" and therefore exhibit P.1 was not a bill of sale and section 10 of the said Ordinance did not apply. With respect I agree with the learned judge. Exhibit P.1 is a document acknowledging receipt of the purchase price of $2,500 and stating that the objector is the rightful owner of house No. 7-B, Kampong Bharu, Lunas, Kedah. It was purchased on 25th June, 1962, from the defendant, nearly two years before the plaintiff obtained a decree against the defendant. Exhibit P.1 was properly stamped and on 26th June, 1962, it was submitted to the chairman of the Lunas Local Council together with an application for transfer (Exhibit P.2) and on 27th June, 1962, the said application was approved and such approval was endorsed on Exhibit P.2. A clerk of the Lunas Local Council produced these exhibits in court and testified that the objector became the owner of the said premises and paid all rates and assessments. According to the objector, her daughter lived in the said house and at times she also lived there. Her evidence was not contradicted.

In his judgment the learned judge commented upon the conduct of the president, sessions court, who took upon himself the task of procuring further evidence for the parties, after the objector had closed her case and no evidence was adduced by the plaintiff and no witness called by him. The learned president himself called one Mohamed Bakhtin bin Haji Salleh and examined him at length. The learned judge held that such practice was highly undesirable and could lead to a miscarriage of justice. I am in full agreement with him. It was held in *In re Enoch and Zaretzky, Bock & Co's Arbitration* [1] that:—

> "Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties."

And in the case of *Jones* v. *National Coal Board* [2] Denning L.J. (as he then was) said:—

> "So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties:"

In my opinion the learned judge had come to the right decision in allowing the appeal of the objector and the appeal by the appellant to this court was therefore dismissed with costs here and in the courts below.

Azmi C.J. (Malaya): I had the opportunity of reading the judgment of my lord the Lord President with which I wholly agree but I would like, however, to say a bit more.

Even assuming that the house was a chattel, which is doubtful, but on looking at the whole transaction in this case and the document Exh. P.1, there cannot be any doubt that immediately after the transaction was completed and the document executed, the objector went into possession of the house and for that reason in my view the transaction and the document relating to it are not affected by the Bills of Sale Ordinance.

The appeal should therefore be dismissed with costs here and in the court below. Deposit to respondent towards taxed costs.

Ong Hock Thye F.J.: This is an appeal against the decision of S. M. Yong J. in the High Court at Alor Star, reversing the judgment of the President of the Sessions Court at Sungei Patani and declaring that the respondent was the owner of house No. 7-B, Kampong Bharu, Lunas, which, consequently, was not liable to attachment upon a decree obtained by the appellant in the Sessions Court against one Teoh Chin Seng.

This appeal is wholly bereft of merits. Teoh Chin Seng was the *quondam* owner of the house in question, which was built on land belonging to another. On June 25, 1962 he sold this house to the respondent and gave her a note or memorandum of the sale, which was stamped for *ad valorem* duty at the Stamp Office the same day. On June 26 the respondent delivered to the Lunas Local Council both the sale note and a letter signed by the vendor requesting registration of the house in the name of the new owner for payment of local rates. An official receipt No. 3485012 was issued on June 26 by the Local Council for the fee paid on this application. Council approval of the change was given on June 27, 1962 and endorsed on the application.

On July 7, 1962 Teoh drew two cheques for $1,000 each and delivered them to the appellant. On July 30, 1963 Teoh was sued thereon and a decree obtained against him in due course. On June 21, 1964 the appellant's solicitors sought information from the clerk in the Lunas Local Council regarding the ownership of house No. 7-B Kampong Bharu with a view to levying execution. They were informed that the owner was Teoh. The house was thereupon attached on June 25, 1964. The solicitors' inquiry, however, had raised certain gnawing doubts in the mind of the clerk to the local council. He then found that he had forgotten to record the change of ownership, which he should have done on June 26, 1962. He informed the appellant's solicitors to that effect on June 30, 1964 and rectified the error in the register by an entry on that date. The execution, however, was not withdrawn and on July 3, 1964 the respondent was compelled to lodge her objection, claiming ownership of the property.

On the hearing of the objection, the respondent, as objector was heard first. She produced

the sale note, the letter signed by Teoh, and the local council's official receipt. Their genuineness was never questioned. She called the clerk, who confirmed that she was owner of the house since June 25, 1962. The appellant, who was present and attended by counsel, elected to give no evidence.

The learned president gave judgment in favour of the appellant. In the High Court this judgment was reversed. With all respect, I think the issues raised and arguments considered in both courts below were wholly idle and irrelevant: see [1967] 1 M.L.J. 236.

The simple reason is that a judgment creditor can levy execution only on property belonging to the debtor or appearing to belong to him by reason of being in his apparent possession, not, certainly, on property belonging to any third party at the creditor's mere whim and fancy. On what grounds did the appellant claim the right to levy attachment in the instant case? None at all. He did not condescend to state them. Nor did he make any attempt to rebut the objector's claim to *bona fide* ownership by purchase. The judgment of the High Court, therefore, is right, though for reasons which, with respect, I consider beside the point. I do not agree, however, that it is also right as to costs. Where a party successfully enforces a legal right and in no way misconducts himself he is entitled to costs as of right: see *Jones* v. *Curling* [3] and *Donald Campbell & Co. Ltd.* v. *Pollak.* [4] I cannot understand how the judicial discretion was exercised in this case to deny the respondent any costs whatsoever.

This appeal is accordingly dismissed and the judgment of the High Court affirmed except as to costs. I would award all costs in the courts below to the respondent.

Appeal dismissed.

Solicitors: *Lim Kean Siew & Co.; Oo Gin Sun.*

SANIAH & ORS. v. ABDUL HAMID & ORS.

[O.C.J. (MacIntyre J.) June 29, 1967]

[Ipoh — Civil Suit Nos. 140, 141 & 142 of 1964]

Damages — Personal injuries — Multiple lacerated wounds on face — Noticeable scars and keloid formation — Fractures — Shortening of leg by 1½" — Physical disability not affecting employment — Disfigurement of face and physical disability impairing prospects of marriage.

Damages — Personal injuries — Fracture of cervical spine — Weakening of muscles of forearm — Fingers of right hand could only be partially flexed or extended — Grip and finer movement of fingers not possible within any degree of efficiency — Loss of sensation to pain or temperature.

Damages — Personal injuries — Fracture of jaw — Protosis right eye — Condition has a disfiguring effect — Eye hurts when facing strong sunlight — Impairment of prospects of marriage — Employment not effected.

The three plaintiffs who were members of a female football team sustained various degrees of personal injuries as a result of a collision between the motor car in which they were passengers and an omnibus.

The first plaintiff, Saniah, a junior agricultural assistant, 19, at the time of the accident, was hospitalized from December 16, 1961 to March 22, 1962. She suffered the following injuries: multiple lacerated wounds of the right chin and face; lacerated wound 1" long just lateral to the left eye; haematoma on the ventral surface of the left forearm; fracture of right femur; fracture of the left femur; fracture of the left clavicle; fracture of right ulna; fracture of left radius, lower end. On December 20, 1963 medical examination showed that the skin over the two linear scars on right side of the face had slightly thickened and showed some degree of keloid formation; the fractures of the thigh bones had united with a slight degree of overlapping and mal-alignment of the bones; she walked with a limp owing to the shortening of her right leg by 1½" — a condition which would later contribute towards osteoarthritis. Her physical disability had not affected her employment, but she feared that it might have diminished her prospects of promotion and she claimed that the disfigurement of her face and her physical disability had impaired her prospects of marriage.

Held: (1) damage in respect of reduced prospects of marriage fall under the head of loss of amenities. In this case Saniah's prospects of marriage had been reduced by her loss in appearance and gait as a result of the injuries sustained in the accident;

(2) taking all the facts and circumstances into consideration including reduced prospects of marriage, general damages assessed at $20,000.

The second plaintiff, a school teacher, aged 22, was hospitalized from December 16, 1961 to May 10, 1962. She suffered from: 5" long lacerated wound over the right side of the scalp; fracture of the cervical spine with marked weakness of the right upper and lower extremities and some disturbance of sensation over the left half of the body. Medical examination on October 24, 1963 showed that upper extremity of the muscles of the forearm was weak and that the fingers of the right hand could only be partially flexed or extended. Her ability to grip and the finer movement of the fingers were not possible within any degree of efficiency. As a result of the fracture of the cervical spine, the left side of her body from the shoulder down was not sensitive to pain or temperature.

Held: the limited use of the fingers of her right hand was a serious handicap to her as a teacher and the injury to her spine had permanently deprived her of the ability to participate in out door games. Although she had not complained of reduced prospects of marriage that element of damage cannot be over looked in her case. Taking all the circumstances into consideration, general damages assessed at $15,000.

The 3rd plaintiff, a telephone operator aged 22 was hospitalized from December 16, 1961 to January 21, 1962. On admission her condition and injuries were described as follows: patient was unconscious; bleeding from mouth and right ear; lacerated wound over the right side of scalp; fracture of the jaw. Medical examination showed no evidence of any disability resulting from the injuries. However, as a result of the accident her right eye had been thrust outward, the "protosis right eye" was likely to be permanent. This condition of the eye had a disfiguring effect and her right eye hurt when facing strong sunlight. She claimed that the disfiguration of her eye had impaired her prospects of marriage.